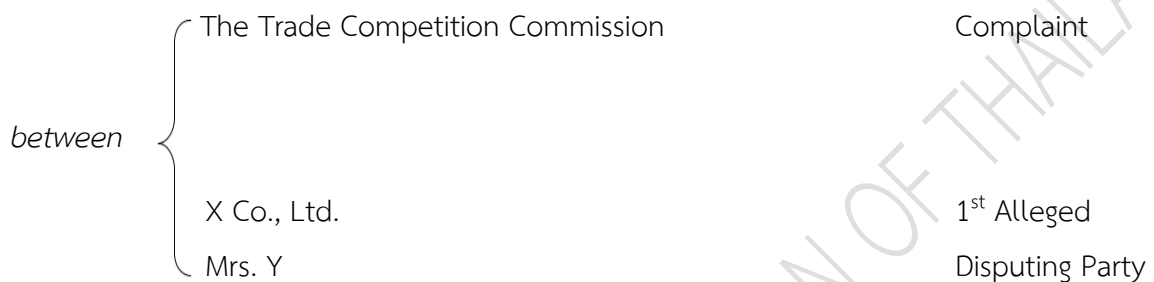




## The Trade Competition Commission Ruling on Unfair Trade Practice of Fruit Sorting and Packing Business



### The Complaint

The Damrongdham Center of District D filed a complaint to the Chairman of the Trade Competition Commission stating that an undertaking used its trade advantages to exploit two Longan growers in District D, requesting the investigation of the trade practice by the undertaking which may constitute offences under the Trade Competition Act B.E. 2560 (2017).

### Facts

Mr. S., the 1<sup>st</sup> Claimant grows longans to sell them exporters. From 2013-2018, The 1<sup>st</sup> Claimant sold longans to Company A at the price of 48-39 Baht per kilogram respectively. Later, Company A notified that they were unable to purchase longans from the 1<sup>st</sup> Claimant since their purchase quota had been filled. At the same time, a Disputing Party approached the 1<sup>st</sup> Claimant to agree upon a sale contract to purchase longans from the 1<sup>st</sup> Claimant. The 1<sup>st</sup> Claimant, therefore, agreed upon that contract to sell longans at 35 Baht per kilogram, whereby the Disputing Party placed a deposit of 300,000 Baht. When concluding the contract, the 1<sup>st</sup> Claimant intended to sell longans directly with the Disputing Party but the contract specified that the other party was the 1<sup>st</sup> Alleged, for which the 1<sup>st</sup> Claimant did not have any doubt, because having an impression that on the date of concluding the agreement, the premises of the 1<sup>st</sup> Alleged was used and the 1<sup>st</sup> Alleged was no longer in business. Moreover, the Disputing Party's employees informed the 1<sup>st</sup> Claimant that the

Disputing Party was renting the premises from the 1<sup>st</sup> Alleged and, thus, used the name of the 1<sup>st</sup> Alleged as the contracting party. When the Disputing Party arrived to harvest longans, the 1<sup>st</sup> Claimant demanded for payment of harvested longans from the Disputing Party and the Disputing Party produced documents for inspection, as well as informed the 1<sup>st</sup> Claimant that, with the first harvest of longans, a price of 35 Baht per kilogram would be used for calculation but for the second harvest, the price would be 4 Baht per kilogram, arguing that the longans would be sold to other longan bulk-buyers. When this was deducted from the deposit, the 1<sup>st</sup> Claimant would still owe the Disputing Party some money, and, therefore, requested the 1<sup>st</sup> Claimant to agree to extend the contract to the following year. The 1<sup>st</sup> Claimant refused to the offer and, subsequently, asked for help from Damrongdham Center of District D.

Mrs. O, the 2<sup>nd</sup> Claimant, grows longans to sell to bulk-buyers for further export abroad. Contracts for sales of longans by the 2<sup>nd</sup> Claimant were made yearly, changing longan bulk-buyers on a yearly basis. She gets information from other growers on which bulk-buyer has a good purchasing record, was credible, and did not undercut prices. The 2<sup>nd</sup> Claimant followed a particular group on Facebook and saw an announcement to purchase longan leaves, along with contact number. The 2<sup>nd</sup> Claimant called to inquire for details from the Disputing Party and later they agreed to buy and sell longans at 33 Baht per kilogram. The Disputing Party made a deposit of 200,000 Baht with the 2<sup>nd</sup> Claimant and the contract was concluded at the 1<sup>st</sup> Alleged's premises. The 2<sup>nd</sup> Claimant learnt from other growers that the 1<sup>st</sup> Alleged is a credible longan bulk-buyer. When harvesting the longans, the Disputing Party informed the 2<sup>nd</sup> Claimant that the money obtained from the longans was not sufficient for the deposit. The 2<sup>nd</sup> Claimant asked to review the invoice with details of the price specified and found that there was a price discrepancy, not abided by the contractual agreement. For example, in the latest longan sale contract specified the price of 25 Baht per kilogram, compared to 33 Baht per kilogram as originally stated in the contract. However, in the invoice, the Disputing Party gave only 22 Baht per kilogram and the Disputing Party notified the 2<sup>nd</sup> Claimant that an additional amount of xx,xxx Baht was owed to the Disputing Party, requesting the 2<sup>nd</sup> Claimant to agree on in advance for a contract next year by taking the amount of money the 2<sup>nd</sup> Claimant owned to the Disputing Party as a deposit for the following year. The 2<sup>nd</sup> Claimant did not agree to the offer and, subsequently, asked for help from Damrongdham Center of District D.

Once the Disputing Party did not fulfill with the agreement to sell and purchase longans, both claimants were unable to sell their longans to other bulk-buyers because it is prohibited by terms and conditions of the contract with the Disputing Party. Moreover, both

Claimants had to rely on the Disputing Party as they were unable to find sufficient labor to harvest their own produce. Non-performance of the Disputing Party resulted in damages to both Claimants: the 1<sup>st</sup> Claimant did not receive money from selling the longans at 35 Baht per kilogram as agreed, deducting the deposit received from the disputed party, the damage totaled xxx,xxx Baht and the 2<sup>nd</sup> Claimant did not receive the money for longans at 33 Baht per kilogram as agreed, deducting the deposit received from the disputed party, the damage of xxx,xxx Baht was realized. The Disputing Party had already collected their longans making both Claimants unable to claim their longans back for resale to other bulk-buyers because the Disputing Party mixed longans from both Claimants with longans from other growers already, enabling her to undercut the purchasing price. This is considered to be the unfair exercise of superior bargaining power. Had both Claimants accepted the price offered by the Disputing Party, the 1<sup>st</sup> Claimant would have to return xx,xxx Baht and the 2<sup>nd</sup> Claimant would have to return xx,xxx Baht to the Disputing Party. The Disputing Party preemptively claimed that those amounts are deposits for the following year contracts, causing both Claimants not to receive additional payments for the full amount as stated in the contracts, and resulted in them being in debt with the Disputing Party.

The case of the 1<sup>st</sup> Alleged revealed the facts that, it was an actual contractual party, but its name was unlawfully referred to in the documents to force the 1<sup>st</sup> Alleged to pay deposits for both Claimants. When the Disputing Party received the longans and used the produce for her personal benefit, by delivering longans partially to the 1<sup>st</sup> Alleged. Furthermore, the 1<sup>st</sup> Claimant testified that he did not intend to enter a contract with the 1<sup>st</sup> Alleged whatsoever and only intended to enter a contract with the Disputing Party.

### **Issues for Consideration**

1. The issue to be considered is to identify contracting parties of this case.
2. Whether or not the actions by the Disputing Party are the exercise of market power or superior bargaining power to take advantage of its trading partners, causing damages to other undertakings under Section 57 of the Trade Competition Act B.E. 2560.

### **Decisions**

The first issue for consideration is to ascertain contractual parties in this case.

The Trade Competition Commission reviewed the facts, evidence, and documents and applicable laws and acknowledged the purchase contract for longans made between the 1<sup>st</sup> Alleged, through the Disputing Party, and the 1<sup>st</sup> Claimant, and the purchase

contract between the 1<sup>st</sup> Alleged, through the Disputing Party, and the 2<sup>nd</sup> Claimant, along with the letter of certification issued by the 1<sup>st</sup> Alleged, authorizing persons to act on behalf of the company as Mr. J, Mr. Dh, and Mr. Ch whereby at least one of the company's directors provide the signature and the corporate seal are required to make the company legally binding. Both contracts bear no signature of any of the 1<sup>st</sup> Alleged's authorized persons or no power of attorney authorizing the Disputing Party to represent the company in concluding those contracts is witnessed. The contractual parties – by document – were the Disputing Party and the 1<sup>st</sup> Claimant and the 2<sup>nd</sup> Claimant, despite the name of the company of the 1<sup>st</sup> Alleged appeared in the documents. The 1<sup>st</sup> Alleged has no intention to agree upon a contract with either of the Claimants and was only used as evidence to facilitate the purchase of longans from both Claimants. Following harvest of the longans, the Disputing Party delivered a small portion of longans to the 1<sup>st</sup> Alleged, resulting in the 1<sup>st</sup> Alleged receiving no benefit from those contracts and had to pay in advance deposits to both Claimants, which were all a result of the Disputing Party's actions. Therefore, the 1<sup>st</sup> Alleged is suffered as were the Claimants.

Therefore, with the actual contractual party to the 1<sup>st</sup> Claimant and the 2<sup>nd</sup> Claimant was the Disputing Party, who was the signatory on the contracts and benefiting from those contracts.

In addition, when the facts revealed that the 1<sup>st</sup> Alleged was not the actual party to the contract as specified in the documents and was used by the Disputing Party as a reference in order to conclude the contracts to induce the 1<sup>st</sup> Alleged to pay for deposits to both Claimants. Once the produce was harvested, the Disputing Party did not deliver all the produce to the 1<sup>st</sup> Alleged. The produce was used for personal gain by only delivering a small portion of purchased longans to the 1<sup>st</sup> Alleged. Moreover, the 1<sup>st</sup> Claimant provided a statement that he did not intend to enter into a contract with the 1<sup>st</sup> Alleged whatsoever and only intended to do so with the Disputing Party. Therefore, the sub-committee had deliberated and concluded that the 1<sup>st</sup> Alleged, was also suffered from injury in the case, and did not commit any offence or being an accomplice with the Disputing Party.

The next issue to consider is whether or not the actions by the Disputing Party is an exercise of market power or superior bargaining power to take advantage of its trading partners, causing damages to other undertakings under Section 57 of the Trade Competition Act B.E. 2560.

The provision of Section 57 of the Trade Competition Act B.E. 2560 (2017) states “an undertaking is prohibited to conduct any action in which causing damage to other undertakings of the following natures: (1) unfairly restricting business operations of other

undertakings; (2) unfairly exercising market power or superior bargaining power..” Thus, it shall be considered: 1. whether the Disputing Party committed any action that restricting business operations of others undertakings or not; 2. whether the Disputing Party had unfairly exercised market power or superior bargaining power; and 3. whether or those action resulted in damages to other undertakings. Together with the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated the 4<sup>th</sup> of October B.E. 2561 (2018), Item 5 defining “an offence under the provision of Section 57 incurring a loss to another undertaking shall be assessed from apparent and factual economic loss, such as revenue loss of that another undertaking, loss in market value of a product or service, and loss opportunity in producing goods or service;” Item 9 defining “an unfair exercise of market power or superior bargaining power shall have the following characteristics: (1) An undertaking has market power or superior bargaining power over another undertaking; (2) An undertaking exercises its market power or its superior bargaining power to take advantage over, or restricting alternative(s) of, its trading party unfairly.”

The Trade Competition Commission examined the facts, documents, and evidence and applicable laws and finalized that the Disputing Party entered into a contract with the 1<sup>st</sup> Claimant to purchase his longans at 35 Baht per kilogram. When the longans were harvested, the Disputing Party bargained for the lower price, in which the 1<sup>st</sup> Claimant was unable to sell his longans to other bulk-buyers. When the Disputing Party harvested the longans according to the contract, she refused to make payment as prescribed in the contract by setting a new price for the 1<sup>st</sup> Claimant at 4 Baht per kilogram. This resulted in losses for the 1<sup>st</sup> Claimant, not receiving the price as specified in the contract at 35 Baht per kilogram. The 1<sup>st</sup> Claimant was also unable to take the longans back and resell them to other bulk-buyers as his longans had been mixed with longans from other growers already. Determining a new price is considered to be an unfair exercise of superior bargaining power by taking advantage of growers with no option for rectifying the matter. Should the 1<sup>st</sup> Claimant accept the price offered by the Disputing Party, the 1<sup>st</sup> Claimant would have to return xx,xxx Baht to the Disputing Party. The Disputing Party notified that said amount was a deposit for the contact to purchase longans in the following year. This resulted in the 1<sup>st</sup> Claimant not receiving a payment for the full amount as agreed in the contract, and became a debtor to the Disputing Party by default, as well as being unable to sell the longans to other bulk-buyers.

In the case of the 2<sup>nd</sup> Claimant, the Disputing Party concluded a contract with the 2<sup>nd</sup> Claimant to purchase longans at 33 Baht per kilogram. Eventually, the price was bargained down to 25 Baht per kilogram, which the 2<sup>nd</sup> Claimant 2 is unable to sell her longans

to other bulk-buyers. The 2<sup>nd</sup> Claimant suffered losses when the Disputing Party harvested the longans and failed to pay her for the longans. She was unable to take the longans back to resell them to other bulk-buyers as her longans had been mixed in with those from other growers. Determining a new buying price was an unfair exercise of superior bargaining power, taking advantage of a grower who had no other option to resolve the matter. If the 2<sup>nd</sup> Claimant were to accept the price offered by the Disputing Party, the 2<sup>nd</sup> Claimant would have to return a total of xx,xxx Baht to the Disputing Party. The Disputing Party claimed that the said amount which the 2<sup>nd</sup> Claimant owed her would be treated as a deposit for a contract to purchase longans in the following year. Such behavior resulted in the 2<sup>nd</sup> Claimant not receiving the amount agreed upon in the contract, as well as becoming in debt to the Disputing Party and not being able to sell her longans to other bulk-buyers.

The Disputing Party did harvest the longans but did not perform according to the contract causing both Claimants being unable to retrieve their longans back and resell to other bulk-buyers as the longans from both Claimants were mixed with longans from other growers. By calculating the buying price lower than what had been agreed upon in the contracts with both Claimants, it is, therefore, deemed as the unfair exercise of superior bargaining power by taking advantage of growers who were unable to find any alternative. If both Claimants were to accept the price offered by the Disputing Party, both would be unfairly bound into purchase contracts for the following year, resulting in both not receiving the amount agreed upon in the contracts and becoming continuously in debt to the Disputing Party.

Therefore, the actions of the Disputing Party are the unfair exercise of superior bargaining power to take an advantage of or to limit the alternatives of trading parties per Section 57 (2) of the Trade Competition Act B.E. 2560, and the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October B.E. 2561 (2018), Item 9 (2).

### **Resolution of the Trade Competition Commission**

The Trade Competition Commission reached a unanimous decision that the 1<sup>st</sup> Alleged commit no offence and did not conspire with the Disputing Party constituting the unfair exercise of market power or superior bargaining power resulted in damages to other undertakings according to the Trade Competition Act B.E. 2560 and it is deemed to be an injured too.

For the Disputing Party, buying longans by bargaining for or setting lower prices than what were agreed in the contracts, such conduct constitutes the unfair exercise of market power or superior bargaining power, resulted in damages to other undertakings under Section 57 (2) of the Trade Competition Act B.E. 2560, together with the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October B.E. 2561 (2018), Item 9 (2). Even the Disputing Party had concluded the contracts with both Claimants since August 2019 and was due to harvest the produce in January – February 2020 which was the seasonal harvest, not the continuous committing the offence, the administrative fine, based on the Disputing Party's revenue in 2019, shall be determined at 180,000 Baht. Since that conduct causing contained damages within the specific area and the Disputing Party had fully compensated the damages for both Claimants to their satisfactions, the Trade Competition Commission, hence, reached a unanimous decision to determine the administrative fine at the rate of 5 percent of the Dispute Party's revenue in 2019 amounting 9,000 Baht.

The Trade Competition Commission

18<sup>th</sup> May 2021